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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW JONATHAN GOMEZ, Defendant and Appellant.	E069490 (Super.Ct.No. FWV17002750) OPINION

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno and Jon D. Ferguson, Judges. Affirmed.

Forest M. Wilkerson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Matthew Jonathan Gomez was charged by felony complaint with unlawful possession of ammunition (Pen. Code[1], § 30305, subd. (a)(1)), and it was alleged that he had suffered three prior prison terms (§ 667.5, subd. (b)). He moved to suppress evidence of the ammunition, which was found in his backpack, pursuant to section 1538.5. A trial court heard the motion at the preliminary hearing and denied it. The court also found probable cause to believe the offense occurred as charged and held defendant to answer. Thereafter, an information was filed. Defendant renewed his motion to suppress, pursuant to section 1538.5, subdivision (i). The court heard the motion and denied it again. Pursuant to a plea agreement, defendant pled guilty and admitted one prior prison term enhancement. The court dismissed the remaining prison priors and sentenced him to three years in state prison.

Defendant now contends the trial court erred in denying his motion to suppress evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The court held a joint preliminary hearing and suppression motion hearing, and an officer from the San Bernardino County Sheriff's Department testified as follows:

The police officer was driving his patrol car on the morning of July 10, 2017, in an area known for panhandlers, transients, and the recovery of stolen cars. He observed two individuals near a building—defendant and a man who appeared to be staggering. He turned left to pull into a driveway and contact the man staggering, in order to investigate

[1] All further statutory references will be to the Penal Code, unless otherwise noted.

him for possible public intoxication or being under the influence of a controlled substance. He made contact with that individual and sat him down on the curb. As soon as defendant saw the officer and his patrol car, he grabbed his backpack and scurried away from the officer, around the building. The officer thought defendant's actions were suspicious and that he was trying to evade him. The officer started to go after him, but lost sight of him, so he returned to the man who was staggering.

While the officer was speaking to the man who had been staggering, he observed defendant walk back in his direction and push the crosswalk button to cross the street. The officer asked defendant to come speak with him, saying "Hey." "Come here." Defendant walked over to him and said, "What did I do?" The officer replied, "Nothing, I just want to talk." The officer told defendant to have a seat on the curb and take off his backpack. He then had him stand back up, so he could do a patdown search for weapons. The officer testified that he did not have any affirmative reason to do the patdown search, except simply for officer safety reasons. The officer next asked defendant for some identification (ID), and defendant said his ID was in his backpack. The officer asked if he could search his backpack for his ID, and defendant said, "Yeah, go ahead; I don't have anything on me." Defendant said his ID was in the front small pocket of the backpack, so the officer searched that pocket and found a pipe. He set the pipe aside and continued searching for the ID and found ammunition. He continued searching and eventually found defendant's ID in the large pocket. At that point, the officer detained defendant by placing him in handcuffs. The officer sat defendant back down on the curb,

ran a records check, and discovered that defendant was a convicted felon who was not permitted to own ammunition or firearms. The officer placed him under arrest.

Defendant testified at the hearing that when the officer asked him to go over to talk, he did not feel like he was free to disregard the request. He testified, "I've always known you have to listen to a cop." Defendant said he felt like there would have been a pursuit if he did not listen. He testified that the officer asked to search his backpack, but he did not give consent. Rather, he said, "I don't want to seem uncooperative but I don't like people going through my personal stuff." On cross-examination, when asked if the officer forced him in any way to come talk to him, defendant replied, "He said, 'Hey, you, come here.' " Defendant said the officer did not have his gun out, but he felt he had to go back to him. Defendant also said the officer did not use force to detain him, and he did not tell him he was going to pursue him if he walked away. Defendant repeatedly said he felt like he had to comply because, "[i]f a cop says come here, you come here." Defendant testified that he told the officer his ID was in his backpack, but denied that he gave the officer consent to search.

ANALYSIS

The Trial Court Did Not Err in Denying Defendant's Motion to Suppress

Defendant argues the court erred in denying his motion to suppress evidence derived from the officer's search of his backpack, since the detention was unlawful. He contends that he was detained at the point when the officer said he needed to talk to him, since he did not believe he was free to leave. Furthermore, he points out the officer never

testified he had a suspicion that defendant was engaged in criminal activity. We affirm the denial of the motion.

A. *Standard of Review*

In reviewing the denial of a motion to suppress evidence, "we view the record in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact supported by substantial evidence." (*People v. Jenkins* (2000) 22 Cal.4th 900, 969 (*Jenkins*).)

"The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence.' [Citations.]" (*People v. James* (1977) 19 Cal.3d 99, 107 (*James*).)

On appeal, we " 'may sustain the trial court's *decision* without embracing its *reasoning*. Thus, we may affirm the superior court's ruling on [appellant's] motion to suppress if the ruling is correct on any theory of the law applicable to the case, even if the ruling was made for an incorrect reason. [Citation.]' " (*People v. Vannesse* (2018) 23 Cal.App.5th 440, 444.)

B. *Both Courts Below Denied Defendant's Motion*

After hearing testimony from the officer and defendant at the joint preliminary and suppression motion hearing, the magistrate judge denied defendant's motion to suppress.

The court found that the officer's contact with defendant was a consensual encounter and that the consent was validly given by defendant. Therefore, it denied the motion.

Defendant filed a renewed motion to suppress, but did not submit any evidence. The trial court reviewed the record and the written motions and noted that the magistrate judge did not rule on whether the detention was valid, but treated it as a consensual encounter "from start to finish." The court stated it was bound by the magistrate's factual determination that the search of the backpack was by consent. The court further noted that the magistrate clearly accepted the credibility of the police officer over defendant, and it was bound by the magistrate's credibility determination as well.

The court observed that the officer described his initial contact with defendant as being consensual and noted that there was no gun drawn, and defendant was not outnumbered by officers. However, the court noted the magistrate's finding that the initial encounter was consensual "did not really factor in the patdown." The court then stated that once the patdown occurred, the encounter became a detention, since the officer was directing defendant to sit down, take off his backpack, stand back up again, etc. Thus, the court identified the issue as whether the officer had grounds to detain. The court determined that when defendant saw the officer and scurried away, that conduct could be considered flight. It then considered the factors that the incident occurred in a crime area and that the other man seen staggering was detained for being under the influence. The court concluded that there were grounds to detain, "based on the totality of factors, the minimal nature of the initial intrusion and the consent that was given." It

found that the items found were within the scope of the consent given. Thus, it denied the motion to suppress.

C. *Defendant's Encounter Was Consensual*

"The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' " (*People v. Souza* (1994) 9 Cal.4th 224, 229.) "Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] Our present inquiry concerns the distinction between consensual encounters and detentions. Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 (*Manuel G.*).)

"The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the

encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' " (*Manuel G., supra*, 16 Cal.4th at p. 821.)

Here, the evidence supports the magistrate's finding that defendant's encounter with police was consensual. The evidence showed that when the officer drove up, defendant looked at him, grabbed his belongings, and quickly walked away. The officer thought defendant was trying to evade him, which he considered suspicious. However, he was detaining the other man for possibly being under the influence, he did not pursue defendant. When the officer subsequently asked defendant to come over because he wanted to talk to him, defendant complied. There was no physical force used; there were no guns drawn.

Defendant claims he was detained when the officer said he wanted to talk to him. Although defendant testified that he felt like he could not have ignored the officer's request because there would have been a pursuit, the circumstances did not appear to communicate that, since the officer was busy detaining the other man. In fact, the officer testified that, at that point, defendant was free to go.

However, we observe that once defendant went over to the officer, the officer ordered him to take off his backpack, sit down, and stand up for a patdown search. "In *Terry v. Ohio* (1968) 392 U.S. 1, 27, the United States Supreme Court held that a police officer who lacks probable cause to arrest could undertake a patdown search only '. . . where he has reason to believe that he is dealing with an armed and dangerous individual . . . .' 'The sole justification of the search . . . is the protection of the police

officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.' [Citation.] The officer must be able to point to specific and articulable facts together with rational inferences therefrom which reasonably support a suspicion that the suspect is armed and dangerous." (*People v. Dickey* (1994) 21 Cal.App.4th 952, 955-956 (*Dickey*).)

Here, the officer did not point to any specific facts to support a reason to believe defendant was armed and dangerous. The officer testified that he conducted the patdown search just to make sure defendant did not have any weapons. As such, the patdown search was not justified. (*Dickey*, *supra*, 21 Cal.App.4th at p. 956 [an officer cannot simply search for "officer safety" because a suspect may potentially be armed; specific and articulable facts must be presented].)

D. *Defendant Voluntarily Consented to the Search of His Backpack*

Although the patdown search was not justified, it did not change the consensual nature of the encounter. After the patdown, defendant consented to the search of his backpack. It is undisputed the officer asked defendant for his ID, and defendant said it was in his backpack. The officer testified that when he asked if he could search the backpack for the ID, defendant voluntarily consented. Defendant said his ID was in the front small pocket of the backpack, so the officer searched that pocket and consequently found the ammunition. We note that the officer did not need to have a reasonable suspicion to request ID. (*People v. Lopez* (1989) 212 Cal.App.3d 289, 291.) Furthermore, "an individual's voluntary cooperation with an officer's request for

identification does not convert the request into a detention because the individual is 'free at this point to request that his [identification] be returned and to leave the scene.' " (*People v. Leath* (2013) 217 Cal.App.4th 344, 353.) Moreover, "[a] search conducted pursuant to a valid consent does not violate the Fourth Amendment unless the search exceeds the scope of the consent." (*People v. Bravo* (1987) 43 Cal.3d 600, 605.) Here, the officer searched defendant's backpack pursuant to his consent, and the search did not exceed the scope of the consent. Thus, there was no Fourth Amendment violation with regard to the discovery of the ammunition.

We acknowledge defendant's testimony that he did not consent to the search. However, the magistrate court determined that defendant was not credible, and it found that he did consent. "The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact." (*James*, *supra*, 19 Cal.3d at p. 107.) We have no power to judge the credibility of witnesses or resolve conflicts in testimony. (*Ibid*.)

We conclude that defendant's overall encounter with the police was consensual. As such, no articulable suspicion that he had committed or was about to commit a crime was required. (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.) Defendant voluntarily consented to the search of his backpack for his ID, and that led to the discovery of the ammunition. Viewing the evidence in the light most favorable to the trial court's ruling, as we must, we affirm the court's ruling on the motion to suppress. (See *Jenkins*, *supra*, 22 Cal.4th at p. 969.)

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.